No. 94-1173

In the Supreme Court
OF THE
United States

OCTOBER TERM, 1994

PEOPLE OF THE STATE OF CALIFORNIA and
PUBLIC UTILITIES COMMISSION OF THE
STATE OF CALIFORNIA,
Petitioners,

VS.

FEDERAL COMMUNICATIONS COMMISSION and
UNITED STATES OF AMERICA,
Respondents.

On Petition For A Writ Of Certiorari
To The United States Court Of Appeals
For The Ninth Circuit

CALIFORNIA'S REPLY BRIEF

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PRELIMINARY STATEMENT

Contrary to respondents' argument, the issue in this case is whether the Federal Communications Commission ("FCC") may preempt state regulation applicable only to the intrastate portion of a telephone company's services whenever the FCC believes that such regulation is economically inefficient.

Respondents concede that it is technically feasible for a telephone company to comply with differing state and federal regulations when offering jurisdictionally-mixed en-

hanced services. Resp. Br. in Opp. at 9.[1] Moreover, respondents identify no federal regulation applicable to the interstate portion of enhanced services that is negated by a state structural safeguard applicable to the intrastate portion.

Instead, the sole basis of federal preemption here is the notion that state regulations will defeat the policy goal of efficiency stated in Section 151, 47 U.S.C. 151, when a state denies a telephone company the discretion to integrate its intrastate enhanced services with other services in order to avoid the costs of structurally separating its intrastate enhanced services. Resp. Br. in Opp. at 3, 6, 9. Respondents therefore acknowledge that Section 151 provides the only source of authority upon which the FCC has overridden the express bar of Section 152(b), 47 U.S.C. 152(b). Resp. Br. in Opp. at 10.

The Ninth Circuit's sanctioning of preemption on this basis directly conflicts with *Louisiana Pub. Serv. Comm'n v. FCC,* 476 U.S. 355 (1986), and decisions from the Fourth Circuit.

ARGUMENT

In *Louisiana,* this Court rejected "a broad reading of Section 151" which would permit the FCC to override Section 152(b) in order to preempt state regulation "which frustrates the ability of the FCC to perform its statutory function of ensuring efficient, nationwide phone service . . . " *Id.* at 370. This Court further refused to "accept an argument that the FCC may nevertheless take action which it thinks will best effectuate a federal policy," and thereby

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[1] For example, neither the respondents nor respondents-intervenors dispute that it would be possible for a telephone company to assign separate personnel to market intrastate enhanced services on the one hand, and interstate enhanced and all basic telephone services (both interstate and intrastate) on the other.

"expand its power in the face of [the] congressional limitation [of Section 152(b)] on its jurisdiction . . . " *Id.* at 374. This Court said: "As we so often admonish, only Congress can rewrite this statute." *Id.* at 376.

Respondents nevertheless attempt to narrow *Louisiana* by inappropriately limiting Section 152(b)'s reach to ratemaking matters, an attempt that was flatly rejected in *Louisiana.* They state that, unlike in the case of ratemaking, the "interstate and intrastate aspects of telephone facilities or services cannot be separated so easily." Resp. Br. in Opp. at 8. In other words, there are costs involved in making such a separation. Respondents then claim that the FCC may override Section 152(b) whenever it believes that compliance with state requirements governing only the intrastate portion of jurisdictionally-mixed services and facilities would be uneconomic to the telephone company. However, if that claim were true, then "it would hardly have been necessary to deny the FCC the jurisdiction over 'charges, classifications, practices, services, facilities, or regulations for or in connection with intrastate communication service,' " since by definition a dual regulatory scheme imposes greater costs than a uniform scheme. *Louisiana,* 476 U.S. at 373. Congress expressly intended to limit the jurisdictional reach of the FCC with respect to each and every term set forth in Section 152(b) when state regulation over such terms is confined to the intrastate sphere.

Respondents and respondents-intervenors further attempt to limit Section 152(b)'s bar to "purely intrastate matters" — matters that have no interstate component — but that argument was also rejected by *Louisiana.* As respondents acknowledge, virtually all telephone facilities can be interchangeably used for interstate and intrastate services, and non-ratemaking regulation affects both interstate and intrastate communications. Resp. Br. in Opp. at 8. If the FCC may preempt state regulation applicable solely to the

intrastate portion of dual-use facilities and services which affects the economic efficiency of the telephone network, then nothing prevents the FCC from confining state regulation to "purely local" matters that do not affect interstate communication. *Louisiana*, 476 U.S. at 374.[2] As stated by this Court, that result "misrepresents the statutory scheme and the basis and test for pre-emption." *Ibid.*

Respondents next ignore language in *North Carolina Utils. Comm'n v. FCC*, 552 F.2d 1036 (4th Cir.), *cert. denied*, 434 U.S. 874 (1977) ("*NCUC II*"), a case cited in *Louisiana* at 476 U.S. at 375 n.4 and fully consistent with *Louisiana*, that directly contradicts the Ninth Circuit's decision below. In *NCUC II*, the Fourth Circuit recognized that it was for the state commission to determine whether the economic and political costs of requiring facilities reserved exclusively for intrastate services were in the interest of intrastate consumers. *Id.* at 1049.[3] Here, the Ninth Circuit impermissibly permits the FCC to substitute its own judgment for the states', and thereby oust the states from weighing the costs and benefits of regulation confined to intrastate services and facilities, including the decision to recover such intrastate costs from intrastate consumers.

In sum, *Louisiana* makes clear that Congress intended Section 152(b) to fence off from FCC reach or regulation all matters — including practices, regulations, and facilities — confined to the intrastate portion of jurisdictionally-

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[2] In any event, the FCC's concession that states retain authority over "purely" intrastate services is illusory. Virtually all services interconnect with the national network, and hence virtually all services are partly interstate.

[3] Under *NCUC II*, it is only when the state chooses not to confine its requirements to intrastate facilities and services that a claim of preemption arises.

mixed services.[4] 476 U.S. at 370. The Ninth Circuit's decision impermissibly permits the FCC to scale this fence in order to effectuate the general efficiency goals of Section 151, and by doing so, effectively overrules *Louisiana*.[5]

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[4] *Louisiana* makes clear that where Sections 152(b) and 151 are in conflict, Section 152(b) prevails. 476 U.S. at 370 ("were we to find [Sections 151 and 152(b)] to be in conflict, we would be disinclined to favor the provision declaring a general statutory purpose, as opposed to the provision which defines the jurisdictional reach of the agency formed to implement that purpose.") Respondents concede that none of the Supreme Court cases other than *Louisiana* involved Section 152(b); hence, such cases are not relevant here.

[5] Respondents contend that review may not be warranted because the FCC is reconsidering its safeguards governing interstate enhanced services and may, however unlikely, change its regulation in a way which will obviate any conflict. However, in its Notice of Proposed Rulemaking, the FCC has indicated no intention to reverse its preemption decision. Moreover, Congress' reservation of authority to the states in Section 152(b) is at stake regardless of whether the FCC adopts new federal regulations for interstate services. Failure to review this case will leave the erroneous preemption standard in place and read the states out of the Communications Act. Accordingly, California, New York, the National Association of Regulatory Utility Commissioners, the National Association of State Utility Consumer Advocates, and forty-two state commissions, consumer advocates, and attorneys general respectfully urge this Court to review this case. *See* Joint Brief As Amici Curiae In Support of Petitioners.

CONCLUSION

For the reasons stated, the petition for a writ of certiorari should be granted.

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